Dan Vance Kimball v Roxande Michelle Kimball & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-957–12 OF 2019
MOHD ARIEF EMRAN J
31 JANUARY 2024

Trusts and Trustees — Trusts — Assets — Plaintiff claimed to be kept out of sums or assets belonged to trust by defendants — Whether Taqua trust suggested by plaintiff existed — Whether actions of first defendant were unlawful as assets jointly owned by plaintiff and first defendant — Whether first defendant guilty of breach of trust — Whether first defendant guilty of revoking trust deeds — Whether plaintiff entitled to claim resulting trust for proceeds of monies and assets — Whether defendants guilty of conspiracy — Whether first defendant was abusive and guilty of domestic violence against plaintiff — Whether first defendant denied plaintiff access to his children and his private properties

The plaintiff and the first defendant were husband and wife that had earlier set up a trust known as Kimball 3 living family trust, a trust under the laws of California, United States ('Kimball trust') which included property known as 945, Ward Drive SP 55, Santa Barbara, California ('Ward Drive property'). The Ward Drive property was bought utilising a loan in the sum of USD350,000 from the Pollard living trust, an entity set up to care for the mother of the first defendant. Under the terms of the said loan, the plaintiff as the trustee of the Kimball trust agreed to pay interests on the loan and the principal would be due and payable either on or before 27 August 2006 or when the property was sold. However, the principal due to the Pollard trust and/or due to the estate of the first defendant's mother had not been repaid as of to date. The plaintiff contended that the Kimball trust included these properties ie: (a) 7 San Marcos Trout Club, Santa Barbara, California ('San Marcos'); and (b) 2722, Abilene Drive, Chevy Chase, MD 20815 ('Abilene Drive'). The plaintiff also alleged that there were shares held by his late father that were also placed into the Kimball trust. According to the first defendant, the Pollard trust was created for the care of her mother, and she was the sole trustee as well as the sole beneficiary of the estate of her late mother. The first defendant's mother passed away sometime in 2006 which led to their decision to sell the Ward Drive property and the Kimball trust was dissolved when the family decided to move to Bali, Indonesia. According to the first defendant the funds that were utilised for the purchase of the Indonesian property came from: (i) part of the sale proceeds from the Ward Drive property; and (ii) from the funds received by her from the Pollard trust. Sometime in 2013, the plaintiff and the first defendant decided to move to Malaysia. They decided to sell the property in Bali. The monies received from the sale of the Bali property were

subsequently used to purchase a piece of property at Cyberjaya which was held in the name of the third defendant. Two trust deeds were executed between the first and second defendants with the fourth defendant. The fourth defendant was appointed as a trustee for the monies in various accounts held by the fourth defendant that were held on behalf of the first and second defendants and to hold the shares in the third defendant on behalf of the first and second defendants. The dispute started after the relationship between the plaintiff and the first defendant started to deteriorate. The plaintiff alleged that: (A) he was forced to leave the Cyberjaya house and had since been kept out of the sums or assets that he alleged belonged to the Kimball trust. This included the Cyberjaya house, the bank accounts held in the name of the first defendant and the shares held on trust by the fourth defendant in the third defendant; (B) the first defendant had wrongfully caused the fourth defendant to resign or remove him as trustee of the two referred Malaysian trusts and caused the transfer of shares and the accounts into the name or control of the first defendant; (C) the second defendant had either been forced to execute the documents that had caused the removal of the trustees or his resignation and caused the lost of control of the shares, the accounts and the assets that belonged to the Kimball trust; (D) the Kimball trust assets or the family assets were wrongfully utilised by the first defendant including the transfer of USD400,000 into the first defendant's account in Singapore as well as physical gold valued to the sum of USD166,468 and RM165,000 from the third defendant. The plaintiff repeatedly referred to a Taqua trust that he alleged had replaced the Kimball trust; and (E) the fourth defendant had assisted or conspired with the first defendant to cause the breach of the Kimball trust and/or the Taqua trust.

Held, dismissing the claim:

(1) The recital to the trust deeds relied on by the plaintiff suggested that parties had planned to set up a new family trust that would be named as the Taqua trust for the family. The terms of the Taqua trust, the subject matter of the Taqua trust, the beneficiary and settler of the alleged trust were not clear. The intention to create the Taqua trusts, the terms of the Taqua trusts, the subject matter of the Taqua trusts and the beneficiaries of the Taqua trusts were not certain that the trusts did not fulfil the requirements for there to exist a valid Taqua trust. The three certainties for the creation of express trust had not been satisfied. The terms of the trust, the identity of the assets subject to the terms of the trust and the identity of the beneficiaries had not been laid down in the terms for there to exist a Taqua trust. It was only planned, and the terms would be discussed and agreed between the first and second defendants as well as their children. Therefore, the Taqua/family trust did not come into fruition contrary to the claims by the plaintiff. The plaintiff's claim that there existed a Taqua trust was wrong. The plaintiff had failed to

discharge his burden of proof. Thus, the plaintiff lacked any locus standi to make any claims concerning the two Malaysian trusts (see paras 55, 59, 62 & 65–66).

(2) The allegations put forth by the plaintiff were not supported by any documents or any other evidence. It was not credible that there was no documentary evidence that could be produced to show that the San Marcos property, the shares and the Abilene Drive were transferred into the Kimball trust. The plaintiff must be cognisant of the debt owed by the Kimball trust to the Pollard trust/estate. Even the plaintiff's own conduct showed that he was cognisant and agreed that the first defendant was entitled to the proceeds from the Pollard trust/estate upon the death of the first defendant's mother. The plaintiff had failed to prove that the purchase of the Indonesian property and its development came from funds that were contributed by him either through the Kimball trust or from his own personal funds. The plaintiff's conduct before the suit was filed showed that he recognised his wife's rights to the said sums. He clearly agreed to allow his wife to retain the proceeds solely in her name without complaint. Therefore, the plaintiff was estopped from denying that the first defendant had exclusive rights to deal with the assets and property. The assets in dispute belonged to the first defendant and the plaintiff had no right to claim the same (see paras 71, 78, 82, 87–88 & 91).

(3) The first defendant was not guilty of breach of trust in removing the second defendant as suggested by the plaintiff. The evidence of the second defendant was unreliable. It was unbelievable for her to know the finances of her parents when she was still a teenager and when she was attending school and university. Her evidence that she was allegedly abused by the first defendant and that she was abusive to her siblings were fabricated and untrue. Further, the second defendant was not forced to execute the revocation of the trust. She agreed to the same and decided to comply with her mother's wishes. This did not mean that she was coerced. There was also no evidence that the first defendant had wrongly withdrawn any sums or taken any physical gold valued to the sum of USD166,468 and RM165,000 from the accounts of the third defendant. These were mere conjectures on the part of the plaintiff unsupported by any reliable evidence (see paras 99–103).

(4) A resulting trust had not been proved. The plaintiff recognised that the funds belonged to the first defendant, and he had no right to the said sums. This claim only arose once the plaintiff realised that the family relationship had fallen apart, and he had no right to claim any monies or assets owned by the first defendant. This claim was a mere afterthought on the part of the plaintiff. On the issue of constructive trust, the equity of this case did not support the plaintiff. There was no unconscionable

conduct on the part of defendants as suggested by the plaintiff. The plaintiff had failed to prove his case against the defendants (see paras 105–107 & 109–110).

(5) There was no wrongdoing as alleged by the plaintiff. The parties had acted honestly in accordance with the terms of the trust instruments. Furthermore, any dispute that parties had against the fourth defendant was resolved amicably and did not form part and parcel of the claim before the court (see paras 111–112).

(6) On the issues concerning the alleged violence, abuse, and denial of the plaintiff's rights as a parent and to his property against the first defendant, there was no evidence to support the plaintiff's contention (see para 113).

[Bahasa Malaysia summary

Plaintif dan defendan pertama adalah suami dan isteri yang sebelum ini menubuhkan amanah dikenali sebagai amanah keluarga hidup Kimball 3, amanah di bawah undang-undang California, Amerika Syarikat ('amanah Kimball') yang termasuk hartanah yang dikenali sebagai 945, Ward Drive SP 55, Santa Barbara, California ('hartanah Ward Drive'). Hartanah Ward Drive itu dibeli menggunakan pinjaman berjumlah USD350,000 daripada amanah hidup Pollard, sebuah entiti yang ditubuhkan untuk menjaga ibu kepada defendan pertama. Di bawah terma pinjaman tersebut, plaintif sebagai pemegang amanah Kimball bersetuju untuk membayar faedah ke atas pinjaman dan prinsipal akan dibayar dan perlu dibayar sama ada pada atau sebelum 27 Ogos 2006 atau apabila hartanah itu dijual. Walau bagaimanapun, prinsipal terhutang amanah Pollard dan/atau terhutang harta pusaka ibu defendan pertama belum dibayar balik setakat ini. Plaintif menegaskan bahawa amanah Kimball termasuk hartanah ini iaitu: (a) 7 San Marcos Trout Club, Santa Barbara, California ('San Marcos'); dan (b) 2722, Abilene Drive, Chevy Chase, MD 20815 ('Abilene Drive') . Plaintif juga mendakwa bahawa terdapat saham yang dipegang oleh mendiang bapanya yang turut diletakkan dalam amanah Kimball. Menurut defendan pertama, amanah Pollard diwujudkan untuk menjaga ibunya, dan dia merupakan pemegang amanah tunggal serta benefisiari tunggal harta pusaka mendiang ibunya. Ibu defendan pertama meninggal dunia pada tahun 2006 yang membawa kepada keputusan mereka untuk menjual hartanah Ward Drive dan amanah Kimball telah dibubarkan apabila keluarga memutuskan untuk berpindah ke Bali, Indonesia. Menurut defendan pertama, dana yang digunakan untuk membeli hartanah Indonesia itu datang daripada: (i) sebahagian daripada hasil jualan daripada hartanah Ward Drive; dan (ii) daripada dana yang diterima olehnya daripada amanah Pollard. Pada tahun 2013, plaintif dan defendan pertama memutuskan untuk berpindah ke Malaysia. Mereka memutuskan untuk menjual hartanah di Bali. Wang yang diterima daripada penjualan hartanah Bali itu kemudiannya digunakan untuk membeli sebidang hartanah di Cyberjaya yang dipegang atas

A nama defendan ketiga. Dua surat ikatan amanah telah dilaksanakan antara defendan pertama dan kedua dengan defendan keempat. Defendan keempat telah dilantik sebagai pemegang amanah bagi wang dalam pelbagai akaun yang dipegang oleh defendan keempat yang dipegang bagi pihak defendan pertama dan kedua dan untuk memegang saham dalam defendan ketiga bagi pihak B defendan pertama dan kedua. Pertikaian bermula selepas hubungan antara plaintif dan defendan pertama mula merosot. Plaintif mendakwa bahawa: (A) dia dipaksa meninggalkan rumah Cyberjaya dan sejak itu telah diketepikan daripada jumlah atau aset yang didakwanya adalah milik amanah Kimball. Ini termasuk rumah Cyberjaya, akaun bank yang dipegang atas nama defendan C pertama dan saham yang dipegang atas amanah oleh defendan keempat dalam defendan ketiga; (B) defendan pertama telah secara salah menyebabkan defendan keempat meletak jawatan atau memecatnya sebagai pemegang amanah kedua-dua amanah Malaysia yang dirujuk dan menyebabkan D pemindahan syer dan akaun ke dalam nama atau kawalan defendan pertama; (C) defendan kedua telah sama ada dipaksa untuk menyempurnakan dokumen yang telah menyebabkan penyingkiran pemegang amanah atau peletakan jawatannya dan menyebabkan kehilangan kawalan saham, akaun dan aset yang dimiliki oleh amanah Kimball; (D) aset amanah Kimball atau E aset keluarga telah digunakan secara salah oleh defendan pertama termasuk pemindahan USD400,000 ke dalam akaun defendan pertama di Singapura serta emas fizikal bernilai USD166,468 dan RM165,000 daripada defendan ketiga. Plaintif berulang kali merujuk kepada amanah Taqua yang didakwanya telah menggantikan amanah Kimball; dan (E) defendan keempat telah F membantu atau bersubahat dengan defendan pertama untuk menyebabkan pelanggaran amanah Kimball dan/atau amanah Taqua.

Diputuskan, menolak tuntutan:

G (1) Resital kepada surat ikatan amanah yang disandarkan oleh plaintif mencadangkan bahawa pihak-pihak telah merancang untuk menubuhkan amanah keluarga baru yang akan dinamakan sebagai amanah Taqua untuk keluarga. Terma amanah Taqua, perkara amanah Taqua, benefisiari dan peserta amanah yang didakwa tidak jelas. Hasrat untuk mewujudkan amanah Taqua, syarat amanah Taqua, hal perkara H amanah Taqua dan penerima amanah Taqua adalah tidak pasti bahawa amanah itu tidak memenuhi syarat untuk wujudnya amanah Taqua yang sah. Tiga kepastian untuk mewujudkan amanah nyata tidak dipenuhi. Terma amanah, identiti aset tertakluk kepada terma amanah dan identiti benefisiari tidak ditetapkan dalam syarat untuk wujudnya amanah I Taqua. Ia hanya dirancang, dan terma akan dibincangkan dan dipersetujui antara defendan pertama dan kedua serta anak-anak mereka. Oleh itu, amanah Taqua/keluarga tidak terlaksana bertentangan dengan tuntutan oleh plaintif. Dakwaan plaintif bahawa wujudnya amanah Taqua adalah salah. Plaintif telah gagal menunaikan beban

pembuktiannya. Oleh itu, plaintif tidak mempunyai sebarang locus standi untuk membuat sebarang tuntutan berkaitan dua amanah Malaysia (lihat perenggan 55, 59, 62 & 65–66).

(2) Tuduhan yang dikemukakan oleh plaintif tidak disokong oleh mana-mana dokumen atau sebarang keterangan lain. Adalah tidak boleh dipercayai bahawa tiada keterangan dokumentari yang boleh dikemukakan untuk menunjukkan bahawa hartanah San Marcos, saham dan Abilene Drive telah dipindahkan ke dalam amanah Kimball. Plaintif mesti menyedari hutang yang terhutang oleh amanah Kimball kepada amanah/pusaka Pollard. Malah kelakuan plaintif sendiri menunjukkan bahawa dia sedar dan bersetuju bahawa defendan pertama berhak mendapat hasil daripada amanah/pusaka Pollard selepas kematian ibu defendan pertama. Plaintif telah gagal membuktikan bahawa pembelian hartanah Indonesia dan pembangunannya datang daripada dana yang disumbangkan oleh beliau sama ada melalui amanah Kimball atau daripada dana peribadi beliau sendiri. Kelakuan plaintif sebelum saman difailkan menunjukkan bahawa dia mengiktiraf hak isterinya ke atas jumlah tersebut. Dia jelas bersetuju membenarkan isterinya menyimpan hasil semata-mata atas namanya tanpa aduan. Oleh itu, plaintif telah dihalang daripada menafikan bahawa defendan pertama mempunyai hak eksklusif untuk berurusan dengan aset dan hartanah. Aset yang dipertikaikan adalah milik defendan pertama dan plaintif tidak mempunyai hak untuk menuntut perkara yang sama (lihat perenggan 71, 78, 82, 87–88 & 91).

(3) Defendan pertama tidak bersalah kerana pecah amanah dalam memecat defendan kedua seperti yang dicadangkan oleh plaintif. Keterangan defendan kedua tidak boleh dipercayai. Sukar untuk dia mengetahui kewangan ibu bapanya ketika dia masih remaja dan ketika dia bersekolah dan universiti. Keterangannya bahawa dia didakwa didera oleh defendan pertama dan bahawa dia menganiaya adik-beradiknya adalah rekaan dan tidak benar. Selanjutnya, defendan kedua tidak dipaksa untuk melaksanakan pembatalan amanah. Dia bersetuju dengan perkara yang sama dan memutuskan untuk mematuhi kehendak ibunya. Ini tidak bermakna dia dipaksa. Juga tiada keterangan bahawa defendan pertama telah salah mengeluarkan sebarang jumlah atau mengambil sebarang emas fizikal bernilai USD166,468 dan RM165,000 daripada akaun defendan ketiga. Ini hanyalah andaian di pihak plaintif yang tidak disokong oleh sebarang keterangan yang boleh dipercayai (lihat perenggan 99–103).

(4) Amanah berbangkit tidak dibuktikan. Plaintif mengiktiraf bahawa dana itu adalah milik defendan pertama, dan dia tidak mempunyai hak untuk jumlah tersebut. Tuntutan ini hanya timbul apabila plaintif menyedari bahawa hubungan keluarga telah runtuh, dan dia tidak mempunyai hak

untuk menuntut sebarang wang atau aset yang dimiliki oleh defendan pertama. Tuntutan ini adalah pemikiran semula di pihak plaintif. Mengenai isu amanah konstruktif, ekuiti kes ini tidak menyokong plaintif. Tiada kelakuan yang tidak wajar di pihak defendan seperti yang dicadangkan oleh plaintif. Plaintif telah gagal membuktikan kesnya terhadap defendan (lihat perenggan 105–107 & 109–110).

(5) Tiada salah laku seperti yang didakwa oleh plaintif. Pihak-pihak telah bertindak jujur mengikut terma instrumen amanah. Tambahan pula, sebarang pertikaian pihak-pihak terhadap defendan keempat telah diselesaikan secara baik dan tidak menjadi sebahagian daripada tuntutan di hadapan mahkamah (lihat perenggan 111–112).

(6) Mengenai isu mengenai dakwaan keganasan, penderaan, dan penafian hak plaintif sebagai bapa dan hartanya terhadap defendan pertama, tidak ada keterangan untuk menyokong pertikaian plaintif (lihat perenggan 113).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

David Wee Eng Siew (administrator to the estate of Lim Eang Tee, deceased) v Lim Lean Seng & Anor (as executors and trustees of the estate of Lim Eow Thoon, deceased) [2018] Supp MLJ 50, FC (distd)

Doreen Grace Paul v Bridget Constance [1977] 1 WLR 527, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)

KTL Sdn Bhd & Anor v Leong Oow Lai [2014] MLJU 1405; [2014] 1 LNS 327, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Lembaga Tabung Haji & Anor v Encap Sdn Bhd [2024] 2 MLJ 98; [2023] 1 LNS 2381, CA (refd)

Lew Pa Leong v Chi Shen Lan [2007] 4 MLJ 13, CA (refd)

RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal [2016] 1 MLJ 175; [2015] 1 CLJ 309, FC (distd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (distd)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, HC (refd)

Theow Say Kow @ Teoh Kiang Seng, Henry v Graceful Frontier Sdn Bhd & Ors and other appeals [2020] MLJU 57; [2020] 1 LNS 52, CA (distd)

Legislation referred to

Evidence Act 1950 ss 45, 101

Stefan Aaron Maman (Ann & Anuar) for the plaintiff.

Chan Mun Fei (with Sharon Chong) (Chan Lee & Co) for the first and third defendants.
Muhammad Adam Abdullah (with Khairunnisa Adriana bt Zainuddin) (Adam Abdullah & Mani) for the fourth defendant.

Mohd Arief Emran J:

INTRODUCTION

[1] The plaintiff alleges that 'there is something rotten in the grand Javanese inspired family home' built in Cyberjaya and the assets held in the company known as Jernih Kerjasama Sdn Bhd, the third defendant.

Kimball 3 Trust

[2] The plaintiff and the First defendant are husband and wife that had earlier set up a trust known as Kimball 3 Living Family Trust, a trust under the laws of California, United States ('Kimball 3 Trust'). The relationship between the husband and wife has since deteriorated, which has led to the current dispute between the litigants.

[3] It is irrefutable that the plaintiff and the first defendant had set up the Kimball 3 Trust which included property known as 945, Ward Drive SP 55, Santa Barbara, California ('Ward Drive property'). The evidence on this issue is clear as the Trust Information Report filed with the County Clerk-Recorder-Assessor of Santa Barbara California dated 16 August 2002 was produced to show that the said property is held by the Kimball 3 Trust. The said property was purchased for the consideration of USD475,000.

Loan from Pollard Living Trust

[4] It is important to note that the Ward Drive property was bought utilising a loan from the Pollard Living Trust, an entity set up to care for the mother of the first defendant. Under the terms of the said loan, which is identified as the promissory note agreement dated 3 September 1998, the plaintiff as the trustee of the Kimball Trust, agreed to:

(a) pay interests on the said loan to the sum of USD2,041.67 per month for September and October 2001 and USD2,158.33 per month thereafter; and

(b) the principal will be due and payable either on or before 27 August 2006 or when the property is sold.

The sum of USD350,000 was borrowed from the Pollard Living Trust to purchase the said property.

The evidence before me shows that the said principal due to the Pollard Living Trust and I or due to the estate of the first defendant's mother hasnot been repaid as of to date. The statement of accounts of the Kimball Trust as of 31 December 2006 shows that interest was still payable to the Pollard Trust and that there is no evidence of any payment of any principal made even as of 31 December 2006 to the said Pollard Trust.

7 San Marcos Trout Club and Abilene Drive properties — Not part of the Kimball 3 Trust

[5] I note that the plaintiff's counsel contends that the said Kimball 3 Trust also included the: (i) 7 San Marcos Trout Club, Santa Barbara, California; and (ii) 2722, Abilene Drive, Chevy Chase, MD 20815. The said properties were sold in 2000 and 2005. I am however not convinced that these two properties were part and parcel of the Kimball 3 Trust.

[6] I make the above finding based on the following. Firstly, the Grant of Deed relating to the San Marcos Trout Club property states that the said properties were held on trust for the Paul Kimball Jnr Trust Agreement dated 3 September 1998. They were not held in the name of the Kimball 3 Trust. There is no evidence that the said property was transferred into the Kimball 3 Trust or the proceeds from the sale of the said property were transferred to the said Kimball 3 Trust.

[7] The plaintiff contends that the said 7 San Marcos property was placed into the Kimball 3 Trust through the Trust Instrument Report dated 16 August 2002 as seen in para 35 of the plaintiff's submission. I however find that this submission is misleading as the property was sold on 7 August 2000 and the Trust Information Report relied on by the plaintiff is dated 10 June 2002. Therefore, this Trust Information Report would only be relating to properties that were held in the year 2002. It is uncertain whether the said 7 San Marcos Property was transferred into the Kimball 3 Trust.

[8] The plaintiff also refers to a grant deed dated 25 August 2006 to show that the 7 San Marcos property was part of the Kimball 3 Trust but again this is not clear from the said document. Exhibit A that was attached to the said instrument that would have explained and particularised the actual property that was held by the Kimball 3 Trust on that date was not produced with the said grant deed. The plaintiff had also not produced evidence to show where the proceeds from the said sale were deposited. Hence I find that there is no evidence to show that the 7 San Marcos property was made part of the Kimball 3 Trust.

[9] More so when the only evidence relied on by the plaintiff at para 36 of its written submission refers to the Trust Information Report dated 16 August 2002. I find this to be unlikely as even the plaintiff contends the said San Marcos property was sold on 7 August 2000. Therefore, it could not have been part of the Kimball 3 Trust as it was sold on 7 August 2000 even before the Trust Information Report dated 16 August 2002. There is also no conveyance of the said property from Paul Kimball Jnr J and Dan Vance Kimball, the trustees of the Paul Kimball Jnr Trust fund to the Kimball 3 Trust. Evidence of this conveyance was not produced before this Court.

[10] The same can be said of the property held jointly by the litigants known as 2722 Abilene Drive. This property was not specifically stated to be part and parcel of the said Kimball 3 Trust. I have perused the said Kimball 3 Trust instrument and I find that the only property mentioned therein is the 945 Ward Drive property in Santa Barbara California. The two other properties were not mentioned in the said instrument.

[11] The Abilene property was allegedly acquired on 27 July 2004 and subsequently sold on 25 May 2005 for the sum of USD810,000. The sale and purchase instrument dated 25 May 2005 did not mention that the sale was undertaken by the trustees of the Kimball 3 Trust but was undertaken by the first defendant and the plaintiff as husband and wife, registered owners of the property. In other words, the said property was not made part of the Kimball 3 Trust. There is also no evidence that the proceeds of the said sale were paid into the account of the Kimball 3 Trust.

[12] I also find that unlike the said 945 Ward Drive property, the plaintiff did not produce any evidence that the 7 San Marcos property, 2722 Abilene Drive property or the proceeds from the sale of these two properties were transferred or made part and parcel of the Kimball 3 Trust. These properties or the proceeds from their sale must be specifically transferred into the name of the Kimball 3 Trust and must be included as part of the assets owned by the said trust before they could be considered as part of the estate of Kimball 3 Trust.

[13] I reproduce parts of the Terms of the Kimball 3 Trust which are material to the facts of this case:

> Section 1.01 Trust Estate Defined and Trust Purpose
>
> All property hereafter transferred or conveyed to and received by the Trustee to be held pursuant to the terms of this instrument is herein called the 'Trust Estate' and shall be held, administered and distributed by the Trustee as provided in this Trust Agreement. The Settlors shall transfer and deliver to Trustee the property described in the various schedules accompanying this Trust. Such title and interests the Trustee has received or may hereafter acquire in that property and such other property as may hereafter be added to the Trust, shall be vested in the trustee.

The primary Trust purposes shall be to provide for the health, support, and maintenance of the Settlors during their lifetime, in their accustomed manner of living. The secondary Trust purposes shall be to permit the Settlors to provide funds for the reasonable health, support, and education of the Settlors designated beneficiaries.

Section 1.04 Additions to Trust properties

a) At any time during the continuance of this Trust the Trustee, in the Trustee's sole discretion after consideration of the possible tax consequences thereof to all concerned, is authorised to receive additions of cash or other properties to the Trust, subject to any conditions to which the Trustee may agree, from any source whatsoever without limitation, whether by gift, will or otherwise. However, the Trustee shall accept all assets which any person or persons may give, devise, and/or bequeath by last will and testament to this Trust hereunder as well as all assets which may be transferred to this Trust pursuant to the expressed provisions of any other Trust document or documents of any kind.

Section 1.05 Separate and Community Property Remain as Such

All property now or hereafter conveyed or transferred to the Trustee pursuant to this Declaration, which was community property, quasicommunity property, or separate property at the time of such conveyance or transfer, shall retain its character respectively, as community property, quasi-community property, or the separate property of the Settlor transferring such property to the Trust.

For the purpose of devise or distribution to the beneficiaries of the Settlor who owns such separate property, all property listed on the accompanying 'Husband's Separate Property Schedule' shall be allocated to the beneficiaries of the Settlor/Husband listed on his schedule. All property listed on the accompanying 'Wife Separate Property Schedule' shall be allocated to the beneficiaries of the Settlor/Wife listed on her schedule. Final distribution of the property listed on these accompanying schedules, if not otherwise noted herein, shall be at the death of the surviving spouse.

All other Trust property acquired during the Settlor's marriage, unless included in either the 'Husband's Separate Property Schedule' or Wife's Separate Property Schedule, 'shall retain the nature of its previous character and shall be distributed according to the terms of this Trust Agreement.

Section 1.06 Amendment and Revocation

b) During the joint lifetimes of the Settlors, this Trust may be revoked in whole or in part with respect to community property by an instrument in writing signed by either Settlor and delivered to the Trustee and other Settlor, and with respect to separate property by an instrument in writing signed by the Settlor who contributed that property to the Trust delivered to the Trustee. Any property withdrawn from the Trust Estate by reason of any revocation shall be delivered by the Trustee to the Settlor or Settlors revoking the Trust.

Section 2.01 Trust Income

During the joint lives of the Settlors, the Trustee shall at least annually, unless otherwise directed by both Settlors in writing, pay to or apply for the benefit of

Husband and Wife, all of the net income from the Trust Estate in the same proportions as each of their respective interests in the Trust Estate.

Section 8.02 Distribution in Kind or Cash

On any division of the assets of the Trust Estate into shares or partial shares, and on any final or partial distribution of the assets of the Trust Estate, the Trustee, in his or her absolute discretion, may divide and distribute undivided interests of such assets, or may sell all or any part of such assets and make division or distribution in cash or partly in cash and partly in kind. The decision of the Trustee, either prior to or on any division or distribution of such assets, as to what constitutes a proper division of such assets, of the Trust Estate, shall be binding on all persons in any manner interested in any Trust provided for in this Declaration.

[14] I also note that the plaintiff had attempted to produce several parts of the Bank accounts to justify that he had contributed to the Kimball 3 Trust account. I do not accept the argument put forth by the plaintiff, as he has chosen not to produce these documents in full. I also note that these bank accounts also contain different titles such as 'Kimball 3 Living Trust Peace' and 'Kimball Living Trust Buildin' accounts. Only the first page of these documents was produced and the remaining four pages were omitted for reasons not explained to this court.

[15] Even counsel for the plaintiff admits in the plaintiff's written submission that 'there is no documentary evidence submitted to this court to show that the proceeds of sale of 7 San Marcos Trout Club was placed' in the Kimball 3 Trust. He also admits further that 'there is no documentary evidence to show that the 2722 Abilene Drive was ever part of the trust assets'.

Californian law not shown through expert evidence

[16] The only argument put forward is that since allegedly these properties were held on trust is the allegation that under Californian law, it is presumed that properties held by spouses are deemed to be jointly held as community property unless there is an existing prenuptial agreement that states otherwise.

[17] I do not accept the said argument. There is no evidence from any expert on Californian law that was produced by the plaintiff to justify this assertion. This is merely a statement from the Bar without any substance and this court cannot accept such assertions unless there is evidence to support such statements concerning foreign law.

[18] I further note that the plaintiff's attempt to rely on a website that allegedly explains Californian law cannot be accepted as that would be too simplistic and wrong from an evidential perspective. Expert evidence should

have been produced if the plaintiff wanted to show this position and having failed to demonstrate the same, this argument cannot be accepted by this Court. Please refer to s 45 of the Evidence Act.

[19] Furthermore, section 1.05 of the trust deed does indicate that each settlor's separate properties will retain such character despite the same being transferred, if any, into the trust. The trust deed accepts the category of wife's separate Property Schedule and husband's separate Property Schedule which will be allocated to the beneficiary of each listed on his or her schedule if they so wish. In other words, this court cannot presume the legal position put forth by the plaintiff's counsel on common property under Californian law unless an expert is produced.

Share certificates and bank account not complete

[20] The plaintiff also alleges that there were shares held by his late father that were also placed into the Kimball 3 Trust. Again, I do not find any evidence that the said shares were transferred into the said Kimball 3 Trust. The plaintiff has only produced copies of the share certificates that were still in the name of the original owner of Gwen Kimball and Paul Kimball Jnr and not in the name of the Kimball 3 Trust as he alleges.

[21] I note that he has produced the cover page of the trust bank accounts and a summary that was prepared in accordance with the list of shares dated 8 June 1998. However, there is no evidence that these shares were either transferred into the name of Kimball 3 Trust or added as part of the said Trust or they were sold, and the proceeds transferred to the said Trust.

[22] The averments by the plaintiff were merely conjectures and not substantiated by any written evidence. This I find hard to believe as these are shares and would have received substantial consideration if they were sold. If the plaintiff is to be believed he would have surely kept records of these transactions to show that the funds were transferred into the said Kimball 3 Trust.

[23] Therefore, I find that the Kimball 3 Trust only includes the property known as 945 Ward Drive property that was purchased utilising the loan from the Pollard Trust.

Purchase of the Bali property

[24] According to the first defendant, the Pollard Trust was created for the care of her mother, and she was the sole trustee as well as the sole beneficiary of

the estate of her late mother. The first defendant's mother passed away sometime in 2006 which led to their decision to sell the said property and the family's decision to move to Bali.

[25] I also note that the Indonesian property was purchased for the consideration of USD770,000. The evidence before me shows that these sums were paid on 6 August 2007, 20 August 2007 and 18 December 2007 shown in the Bank of Panin cheques paid to the vendor of the property.

[26] These sums would have to be in the Indonesian account before the dates when payment was made to the Indonesian vendor. The first defendant stated that that monies were transferred out of the Pollard Living Trust account in December 2006 and was utilised to purchase the property in Bali, Indonesia. There is no document to contradict her, and the plaintiff has not produced any document to show that the said funds came from the Kimball 3 Trust. The burden of proof lies with the plaintiff to prove his case and does not shift to the first defendant.

[27] It is common ground, as seen in the written submissions of the litigants, that the Kimball 3 Trust was dissolved when the family decided to move to Bali. The said 945 Ward Drive was sold on 13 November 2007 for the consideration of USD475,000 (note that this is an important date). I also find that payment for the said consideration would have only been made after the 13 November 2007.

[28] The evidence of the plaintiff and the first defendant shows that the sum of Indonesian Rupiah 4,187,643,470 was transferred from the United States to Indonesia to PT Berkah Surya Sejati on 17 December 2007. This is equivalent to the sum of USD449,995,00.

[29] The first defendant has shown that sometime in December 2006, the sum of USD678,573.86 was transferred to Bali, Indonesia from the Pollard Trust. It is to be reminded that the first defendant was the Trustee of the Pollard Living Trust, and the account was held in her name known as Michelle Kimball TTEE. According to her, she had transferred these sums to Indonesia.

[30] Substantial sums also had to be utilised to build the property in Bali to enable the family to reside comfortably there. According to the first defendant the funds that were utilised for the purchase of the Indonesian property came from: (i) part of the sale proceeds from the 945 Ward; and (ii) from the funds received by her from the Pollard Trust.

[31] This evidence was not rebutted by the plaintiff, and he has failed to show where did the remaining funds came from. There is not a single shred of

evidence to show that the funds used to purchase the property came from the sale of his alleged assets or the assets bequeathed to the plaintiff from his parents. Instead, I find that the Indonesian property was purchased from the Pollard Trust and partly from the sale of the 945 Ward property.

[32] I therefore find that the Bali property was bought and developed from: (i) the sum of USD475,000 received from the sale of the 945 Ward property; and (ii) the sum of USD678,573.86 that was received from the Pollard Living Trust.

Sale of the Indonesian property

[33] Sometime in 2013, the plaintiff and the first defendant decided to move to Malaysia. They decided to sell the property in Bali.

[34] The Indonesian property was held in the name of Gusti Agung Oka on trust. The said property was sold for the sum of USD3m. After deducting the fees required to Indonesian agents, the plaintiff and the first defendant agreed to receive the sums of USD2,584,000 to be paid solely to the first defendant's account.

[35] The said monies received from the said sale of the Bali property were subsequently used to purchase a piece of property at Cyberjaya which was held in the name of the third defendant. Monies from the said sale of the Bali property were also transferred into the accounts of the third defendant.

Trust deeds executed by the first and second defendants

[36] Two trust deeds were executed between the first and second defendants with the fourth defendant dated 26 February 2014. The first and second defendants agreed to appoint the fourth defendant as a trustee for the monies in various accounts held by the fourth defendant that were held on behalf of the first and second defendants and agreed to hold the shares in the third defendant on behalf of the first and second defendants.

[37] In the aforesaid trust instruments, it was stated that:

(a) bank bccounts (Malaysia), Jakarta and Singapore held in the name of the first defendant:

> (2) The funds held in the Trust Bank Accounts have been fully paid or deemed to have been fully paid by the Beneficiary and the Trust Bank Account are being held by the Trustee as trustee and I or stakeholder for the Beneficiary absolutely as the Trustee hereby acknowledges.
>
> (3) The beneficiary are hereinafter committed to the creation of a family trust

under the name of Taqua Trust or by such other names upon terms and conditions to be spelt out by Roxande Michelle Kimball and Dan Vance Kimball as grantors and beneficiaries of the that trust along with Sage Alia Kimball, Muhammad Musa Ihsan ad-Din Kimball and Ahmadou Bamba Taj ad-Din Kimball. All the money and proceeds from the Trust Bank accounts will be included in the aforesaid family trust. In the event of death of the listed grantors and or the beneficiaries the holding or the demised assets shall automatically be transferred to the remaining and surviving grantors and or the beneficiaries.

(b) the third defendant — company:

(1) Jernih Kerjasama Sdn Bhd (1078091-A),is a private company limited by shares duly incorporated and existing under the laws of Malaysia and having is registered address at No-63 Level 1, Jalan Dato Hj Eusoff, Damai Complex, 5400 Kuala Lumpur (twreiiwftsr referred to as 'the Company').

(2) The Company has as the date thereof an authorised share date thereof an authorised share capital of RM400,000-00 (Ringgit Malaysia Four Hundred Thousand) divided into 400,000 (Four Hundred Thousand) ordinary share of Ringgit Malaysia One (RM1.00) each which 2 (two) ordinary share of Ringgit Malaysia One (RM1.00) each (in this Deed called 'The Issued Shares') have been issued and fully paid thereof.

(3) The Trustees are the legal owners of two (2) ordinary share of Ringgit Malaysia One (RM1.00) each (hereinafter referred to as the 'Trust Shares') and held under the following share certificate(s):

SHARE CERTIFICATE NO	NO OF SHARES
03	1.00
04	1.00

(4) The issue consideration for the sale of Trust Shares have been fully paid or deemed to have been fully paid by the Beneficiary of the Company and the Trust Shares are being held by the Trustees as trustees or stakeholders for the Beneficiary absolutely as Trustee hereby acknowledge.

(5) The Beneficiary are hereinafter committed to the creation of a family trust under the name of Taqua Trust or by such other names upon terms and conditions to be spelt out by Roxande Michelle Kimball Passport No 488953011 and Dan Vance Kimball Passport No 488454246 as grantors and beneficiaries of that trust along with Sage Alia Kimball Passport No. 48384972, Muhammad Musa Ihsan ad-Din Kimball Passport No 483834972, and Ahmadou Bamba Taj ad-Din Kimball Passport No 483334973. All the money and proceeds from the Trust Bank Accounts will be included in the aforesaid family trust. in the event of death of the listed grantors and or the beneficiaries the holding or the demised assets shall and or the beneficiaries.

Claim against the defendants

[38] The dispute started after the relationship between the plaintiff and the first defendant started to deteriorate.

[39] The plaintiff alleges that he was forced to leave the Cyberjaya house and has since been kept out of the sums or assets that he alleges belong to the Kimball Trust. This included the Cyberjaya house, the accounts referred to above and the shares held on trust by the fourth defendant in the third defendant.

[40] He also alleges that the first defendant had wrongfully caused the fourth defendant to resign or remove him as trustee of the two referred Malaysian trusts and caused the transfer of shares and the accounts into the name or control of the first defendant. He also alleges that the second defendant had either been forced to execute the documents that had caused the removal of the trustees or his resignation and caused the lost of control of the shares, the accounts and the assets that belonged to the Kimball Trust.

[41] The plaintiff also alleges that the Kimball Trust assets or the family assets were wrongfully utilised by the first defendant including the transfer of USD400,000 into the first defendant's account in Singapore as well as the lost of almost USD166,468 that was part of the proceeds of the sale of the Bali property. The plaintiff also contends that the first defendant had wrongfully withdrawn the sum of RM165,000 from the third defendant.

[42] I also note that the plaintiff had repeatedly referred to a Taqua Trust that he alleges replaces the Kimball Trust. The said Taqua Trust was not executed by the first and second defendants.

[43] The plaintiff also alleges that the fourth defendant was a party to the above wrong and had assisted or conspired with the first defendant to cause the breach of the Kimball Trust and/or the Taqua Trust.

[44] I note that the claim against the second defendant was withdrawn by the plaintiff.

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[45] The following witnesses gave evidence during the trial of this suit:

(a) plaintiff's witnesses:

(i) the second defendant — Sage Alia Kimball — SP1; and

(ii) the plaintiff — Dan Vance Kimball — SP2.

(b) first defendant:

(iii) Roxande Michelle Kimball — SD1.

(c) fourth defendant

(iv) Sahairubahrim bin Mohd Salleh — SD2.

DECISION OF THIS COURT AND REASONS

Issues to be determined by this court

[46] I summarise that the following issues must be determined by this court:

(a) whether the plaintiff has the locus standi to institute a claim against the first defendant for breach of trust;

(b) whether there exists an alleged trust known as the Taqua trust — the alleged family trust — that should include the bank accounts, the shares held in the third defendant and the Cyberjaya property;

(c) if the said trust existed whether the first defendant is guilty of the breach of trust by removing the second defendant and by withdrawing the sums of USD400,000, physical gold valued to the sum of USD166,468 and RM165,000 from the accounts held by the third defendant or by the first defendant;

(d) whether the first defendant is guilty of revoking the two trust deeds and by failure to transfer the shares in the third defendant to the first defendant;

(e) whether the plaintiff is entitled to claim a resulting trust for the proceeds of the monies and assets that allegedly arose from the Kimball 3 Trust;

(f) whether the actions of the first defendant are unlawful as the assets are jointly owned by the plaintiff and the first defendant which should have been used to create the Taqua Trusts — ownership of the sale of the Bali property;

(g) whether the defendants are guilty of conspiring to commit the above wrongs;

(h) whether the first defendant was abusive and is guilty of domestic violence against the plaintiff; and

(i) whether the first defendant denied the plaintiff access to his children and his private properties.

[47] The burden of proof in this case lies with the plaintiff. The plaintiff must prove that there: (i) exists the Taqua/family trusts as alleged in the statement of claim; (ii) that the properties and assets in Malaysia are part of the Taqua/family trusts; or (iii) that he is entitled to claim title to the proceeds of

sale of the Indonesian property and eventually a resulting or constructive trusts over the assets in Malaysia; (iv) that the first defendant did commit the breaches alleged; and (v) that there was a conspiracy between the First and Third defendants to commit the alleged wrongs.

[48] I refer to *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31 where Salleh Abas FCJ held:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v Chenchamma* AIR 1964 SC 136, 143). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th Ed, paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[49] This obligation was explained by Augustine Paul JC (as he then was) in *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147:

> It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; [1978] 1 LNS 223; *Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75; [1980] 1 LNS 89 and *Johara Bi bte Abdul Kadir Marican v Lawrence Lam* [1981] 1 MLJ 139; [1980] 1 LNS 199). What shifts is the responsibility of adducing evidence to discharge that burden (see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31). When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail.

Whether there was in existence the Taqua trust as suggested by the plaintiff

[50] As parties have agreed that the Kimball 3 Trust was dissolved it is imperative for this court to consider who is entitled to claim for the proceeds of the sale of the Indonesian property.

[51] Parties did not enter any written instrument after the said property was sold except the document confirming that the sums received to the sum of USD2m plus should be paid into the account of the first defendant.

[52] As stated earlier, the first and second defendants then decided to set up the two trust deeds. In the said instruments, it was clearly stated that the assets of the trusts, ie the third defendants and the accounts, belonged to the first and second defendants. These assets were then transferred to the trust to be administered for the benefit of the beneficiaries of these instruments. The beneficiaries of the said trusts were also specified to be specifically the first and second defendants and the trustee to be the fourth defendant.

[53] The only part that allegedly allows a lifeline to the plaintiff appears to be following recitals to the trust deeds that are reproduced for ease of reference:

> The beneficiary are hereinafter committed to the creation of a family trust under the name of Taqua Trust or by such other names upon terms and conditions to be spelt out by Roxande Michelle Kimball and Dan Vance Kimball as grantors and beneficiaries of the that trust along with Sage Alia Kimball, Muhammad Musa Ihsan ad-Din Kimball and Ahmadou Bamba Taj ad-Din Kimball. All the money and proceeds from the Trust Bank accounts will be included in the aforesaid family trust In the event of death of the listed grantors and or the beneficiaries the holding or the demised assets shall automatically be transferred to the remaining and surviving grantors and or the beneficiaries.

[54] I am of the opinion that the said trust deeds clearly show that the beneficiaries of the said trusts were the first and second defendants. The current trusts deeds are separate from the Taqua Trust relied on by the plaintiff.

[55] I find that the recital relied on by the plaintiff suggests that parties had planned to set up a new family trust that will be named as the Taqua trust for the family. This could include assets that were now allocated to the two trusts as well as assets that will be owned by the plaintiff. The terms of the new Taqua trust will have to be determined and the assets identified before the new Taqua trust is set up. These assets, that could be transferred to the new Taqua trust, possibly include assets owned by the children or assets that were put in the name of the children of the married couple. I find that the terms of the Taqua trust, the subject matter of the Taqua trust, the beneficiary and settler of the alleged trust are not clear. Until such a time the Taqua trust is created and terms

specifically particularised, including the identity of the beneficiaries, the assets and the intentions of the settlors, it could not be said that the Trust has come into existence.

[56] It is trite law that for an express trust to exists it must be shown:

(a) certainty to create trust;

(b) certainty of the subject matter of the trust; and

(c) certainty of the beneficiary of the trust.

[57] I refer to *Halsbury Law's of Malaysia* (Vol 5) at [90.004] which states:

> A trust may be created intentionally inter vivos or by will. Such intention must be shown in unequivocal language. Essentials of such creation are:
>
> (1) Property or rights capable of being subjected to the trust.
>
> (2) A declaration of, or disposition on, trust by a person competent to create a trust or an obligation for valuation consideration to create a trust.
>
> (3) Certainty of property and objects so that the trust is administratively workable, and
>
> (4) Compliance with the rule against remoteness preventing interests vesting outside the perpetuity period and the rule against inalienability preventing income from being inalienable for longer than the perpetuity period.

[58] I also refer to *Malaysian Trusts Law* (2nd Ed, Sweet & Maxwell publication) at pp 173–174 which are reproduced below:

> [4.034] As an overview, besides the capacity requirements, there are three basic certainties that must be fulfilled to create a valid trust. These are certainty of intention to create a trust, certainty of subject matter and certainty of beneficiary and the beneficiary's entitlement to the trust property.
>
> [40.35] On the certainty of intention, the settlor must intend to create a trust and his mind must be directed to three aspects of creating a trust. First, trustees are under a duty to carry out his wishes. The settlor must intend to impose legally enforceable duties of trusteeship on the new owner-administrator of the property. His intention to make a trust must be clear even though he does not use the word 'trust'. In other words, there must be an intention to create a trust. He should not intend a gift or any other relationship. He must, where necessary, have validly transferred the trust property to the trustees ... Second, for certainty of subject matter, the property that is subject to the trust must be defined with reasonable precision. The subject matter of the trust and the ascertainable interest of the beneficiaries must be certain. Third on the certainty of the beneficiaries or objects, the settlor has to ascertain the beneficiary of the trust and as mentioned earlier, the beneficial entitlement of the beneficiary. The objects or persons intended to have the benefit of the trust must be certain ...

[59] In this case, I find that the intention to create the Taqua trusts, the terms of the Taqua trusts, the subject matter of the Taqua trusts and the beneficiaries of the Taqua trusts are not certain that the said trusts did not fulfill the above referred requirements for there to exists a valid Taqua trust.

[60] As reproduced earlier, the recital relied on by the plaintiff only states:

> The beneficiary are hereinafter committed to the creation of a family trust under the name of Taqua Trust or by such other names upon terms and conditions to be spelt out by Roxande Michelle Kimball and Dan Vance Kimball as grantors and beneficiaries of the that trust ...

[61] In other words, the first and second defendant had planned to set up a Taqua trust or a family trust in the future. It was a commitment that both wanted to undertake in the future. The terms of which will be discussed and finalised between the plaintiff, the first and second defendants as well as the other children of the family. The identity of the assets of the trusts as well as the beneficiaries of the said trusts will be identified at the time when the Taqua trust is set up. This could include the assets in the current trusts, but this is not specifically confirmed.

[62] Based on the above I find that the three certainties for the creation of express trust have not been satisfied. The terms of the trust, the identity of the assets subject to the terms of the trust and the identity of the beneficiaries have not been laid down in the terms for there to exists a Taqua trust. It was only planned, and the terms will be discussed and agreed between the first and second defendants as well as their children. Therefore, I find the Taqua/family trust did not come into fruition contrary to the claims by the plaintiff.

[63] My views are reinforced by the decision of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, where he states:

> We begin with the proposition that there are three and only three ways in which a gift inter vivos may be made. First, by an outright transfer of the property to the intended donee. Second, by a transfer of the property absolutely to trustees to hold on trust for the donee. Third, by the owner declaring himself as trustee for the donee. An ineffective outright gift will not be saved by the court by construing it as a declaration of trust because 'there is no equity in this court to perfect an imperfect gift': *Milroy v Lord* [1862] 45 ER 1185, per Turner LJ, We find the decision in *Jones v Lock* [1865] 1 Ch App 25 to be a ready illustration of the principle we have just stated.

[64] I further refer to the decision of the English Court of Appeal in *Doreen Grace Paul v Bridget Constance* [1977] 1 WLR 527 where Lord Justice Scarman stated:

A There is no suggestion of a gift by transfer in the present case. The facts of the two cases do not, therefore, very much help the submission of Mr. Blythe but he was able to extract from them this principle: *that there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust* — or, as Mr Blythe put it, *'an intention to dispose of a property or a fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it'* ...

B

[65] For the above reasons, I find that the plaintiff's claim that there exists a Taqua trust as suggested in his statement is wrong. The plaintiff has failed to C discharge his burden of proof. I am also of the opinion the plaintiff has failed to prove on the balance of probabilities as to the existence of the Taqua/family trust as alleged in his statement of claim.

[66] As a result of which, the plaintiff lacks any locus standi to make any D claims concerning the two Malaysian trusts.

Whether the actions of the first defendant are unlawful as the assets are jointly owned by the plaintiff and the first defendant which should have been used to create the Taqua Trusts — The ownership of the proceeds from the sale of the Bali property E

[67] I will now deal with the issue as to whether the plaintiff is correct that he is entitled to part of the proceeds of the sale of the Bali property as he has joint ownership of the same. His argument relies on: (i) the alleged joint ownership F derived from Californian law; and (ii) that the said Bali assets were purchased from the proceeds of the Kimball 3 Trust ie the 945 Ward property.

[68] As I have stated earlier, the plaintiff did not produce any expert evidence that could assist this court in ascertaining whether Californian law recognises G joint asset ownership by a husband and wife. This allegation cannot therefore be accepted by this court unless expert evidence is produced to support the said contention. The plaintiff's reliance on a statement on a website is not sufficient. His counsel should have produced and expert opinion from a Californian legal practitioner is mandatory and cannot be excused. H

[69] I also find that as the Kimball 3 Trust has been dissolved, as agreed by both parties in their written submissions, then it must be determined as to who the proceeds from the said sale of the Kimball 3 Trust assets be paid to or belong I to. I must also find out what were the assets that were held by the Kimball 3 Trust.

[70] As stated in the preceding paragraphs earlier, I find that the only assets that were retained in the Kimball 3 Trust was the 945 Ward Drive property. The

plaintiff has failed to prove that the other assets: (i) the Abilene Drive property; (ii) the San Marcos property; and (iii) the shares were made part of the Kimball 3 Trust.

[71] The allegations put forth by the plaintiff were not supported by any documents or any other evidence. I do not find it credible that there is no documentary evidence that could be produced to show that the San Marcos property, the shares and the Abilene Drive were transferred into the Kimball 3 Trust. This would have surely been done and documented if the plaintiff had intended the said assets to be transferred into the said Kimball 3 Trust.

[72] My views are further reinforced that even the plaintiff's counsel concedes that there is no evidence to support his client's contention. Counsel attempted to rely on an alleged logical outcome of what would have occurred in a marriage. However, this court does not accept such assumptions and cogent evidence must be produced. Failure to provide such evidence proves, on a balance of probability, that the said event suggested did not occur.

[73] In this case, the elephant in the room that the plaintiff prefers to ignore is the debt owed by the Kimball 3 Trust to the Pollard Trust. The plaintiff's counsel has attempted to persuade this court to ignore this debt on the grounds that the party who should claim the same should have been the trustee of the Pollard Trust and not the first defendant. He also suggests that the said debts would also have been contributed to the Kimball 3 Trust and therefore be automatically extinguished.

[74] With due respect, I do not agree with the counsel's arguments on this issue and reject the same.

[75] As I have said earlier, the Kimball 3 Trust owed monies to the Pollard Trust. The property purchased had been financed substantially from the loan received from the Pollard Trust and the funds received from the Pollard Trust. The said debt must be repaid once the underlying asset, ie the 945 Ward Drive property, was sold. Even the plaintiff concedes during his cross examination that the said debt was not paid after the house was sold. This is an obligation that the plaintiff agreed to when the Kimball/Trust took the loan from the Pollard Trust.

> CMF: Let me ask questions. Now this is the promissory note, which this Honorable Court, had refer to you earlier Ok? And this shows that in the acquisition of the Santa Barbara Property, the acquisition price was obtained by way of a loan from the Pollard Living Trust. Do you agree?
>
> Dan: Yes.

[76] This material fact cannot be ignored by this court as it will explain what happened after the family move to Indonesia and why the proceeds of the sale of the Indonesian property were transferred into the name of the first defendant alone.

[77] It is also trite that those who seek equity must do equity. I refer to the judgment of Wong Kian Kheong JC (as he then was) in *KTL Sdn Bhd & Anor v Leong Oow Lai* [2014] MLJU 1405; [2014] 1 LNS 327:

(a) the maxim that Equity follows the law (the application of Equity shall be subject to the operation of statutes) — please see Chang Min Tat J's (as His Lordship then was) decision in the High Court case of *Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140; [1974] 1 LNS 190 at 142;

(b) the maxim that one who comes to Equity must come with clean hands and the maxim that one who seeks Equity must do Equity — the High Court's judgment given by Low Hop Bing J (as His Lordship then was) in *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722; [2001] 4 AMR 4648 at 4666; and

(c) the maxim that no person should take advantage of his or her own wrong — Ian Chin's judgment in the High Court case of *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328; [1995] 1 LNS 81, at 344.

[78] Therefore, the plaintiff must be cognizant of the debt owed by the Kimball 3 Trust to the Pollard trust/estate. He cannot be allowed to ignore this to his benefit. After all, as explained by the first defendant, she was the sole beneficiary of her mother's estate and there is no evidence to rebut this position. Even the plaintiff's own conduct shows that he was cognizant and agreed that the first defendant is entitled to the proceeds from the Pollard Trust/estate upon the death of the first defendant's mother. Otherwise, he would not have agreed to have the proceeds of the sale of the Indonesian property into the name of the first defendant. Surely, if the plaintiff had any right to the monies, the said funds should have then be paid into a joint account.

[79] This fact was also recognised in the two trust instruments referred to and relied on by the plaintiff. The said two instruments clearly indicate that the monies belonged to the first defendant. I do not accept the plaintiff's explanation that he only agreed to the terms because he wanted to appease his wife. I find the real reason was that he agreed to it because he knew that the purchase of the Indonesian property came from the Pollard Trust and that his wife is entitled to the said proceeds.

[80] I also find, as seen in the preceding paragraphs, that the Bali property was not purchased solely from monies received from the sale of the 945 Ward Drive property but from funds received and paid by the first defendant that were derived from the Pollard Trust.

[81] To remind oneself I restate the important dates in chronological order why I am of the above opinion:

(a) the Indonesian Property was purchased for the consideration of USD770,000. The evidence before me shows that these sums were paid on 6 August 2007, 20 August 2007 and 18 December 2007. This indicates that the monies were already in Indonesia on this date;

(b) monies were transferred to Indonesia from the Pollard Trust by the end of December 2007;

(c) the said 945 Ward Drive was sold on 13 November 2007 for the consideration of USD475,000. Monies would have only been transferred after the sale was completed; and

(d) the sum of USD449,995 was transferred to Indonesia only on 17 December 2007.

[82] I also note that, unlike the first defendant, the plaintiff has failed to prove that the purchase of the Indonesian property and its development came from funds that were contributed by him either through the Kimball 3 Trust or from his own personal funds. Once the first defendant produces sufficient evidence to prove her arguments, the onus then shifts to the plaintiff to show that the monies came either from his contributions or from the Kimball 3 Trust and that the Pollard Trust was repaid in full. I find that the plaintiff has failed to discharge this burden.

[83] The above explains the events that transpired after it was decided to sell the Indonesian property and move to Malaysia.

[84] Recognising that the Indonesian property was bought and developed from the debts owed to the Pollard Trust and the monies from the said Pollard Trust, the plaintiff agreed to have the said sums be held solely by the first defendant and not in his name. The plaintiff knew that the property was sold and that the proceeds from the said sale were being transferred to the account held by the first defendant.

[85] This continued after the Cyberjaya property was purchased and the house built. The shares in the third defendant were held by the first defendant and not in the plaintiff's name. The accounts in Jakarta, Singapore and Malaysia were also held in the name of the first defendant and not in the name

of the plaintiff. If it was true that he had a share in the said funds and the property in Cyberjaya, this court would have expected that he would have demanded that his name appear in all instruments of title to these assets. A reasonable person would have undertaken that or at least have this fact recorded in a written instrument executed by the plaintiff and the first defendant.

[86] I also refer to the decision of Gopal Sri Ram JCA in *Lew Pa Leong v Chi Shen Lan* [2007] 4 MLJ 13 where he stated:

> [5] But that is not the only point in this case. There is another. It is this — The parties being husband and wife, the purchase and registration of the subject property by the plaintiff husband in the defendant wife's name made the wife the beneficial owner of the subject property by reason of the presumption of advancement operating in her favour. To hearken to first principles, where A either purchases property in the name of B or voluntarily (that is to say without any consideration) conveys property to B, then there is a resulting trust in favour of A unless B is A's wife or child or someone to whom A stands in *loco parentis*. See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. Very little evidence is required to rebut a resulting trust. This is because equity gives effect to the common intention of the parties by implying a resulting trust in favour of A in the example given. Any evidence, provided it is admissible to show a contrary intention, may suffice to rebut the presumption of resulting trust. The same holds true of the presumption of advancement. There is, however, a very important qualification. The presumption of advancement may not be rebutted by evidence of an improper purpose. See *Palaniappa Chettiar v Arunasalam Chettiar* [1962] 1 MLJ 143; [1962] 1 LNS 115.

[87] This presumption is relied on by the first defendant in this case and I find that this argument is available and correctly relied on by the first defendant. Nonetheless, I do not need to rely on the said presumption as the conduct of parties, the evidence before me and the fact shows that the said assets belonged to the first defendant. I opine that the plaintiff's conduct before this suit was filed shows that he recognises his wife's rights to the said sums. He clearly agreed to allow his wife to retain the proceeds solely in her name without complaint.

[88] I therefore find the plaintiff is estopped from denying that the first defendant had exclusive rights to deal with the assets and property. He did not complaint that the proceeds from the sale were transferred into the name of the first defendant and when the two trusts were created. He had also issued a letter dated 8 March 2016 certifying that the he will not be asking for any more monies from the first defendant and that he owed monies to her. If indeed these assets belonged to the plaintiff, either through the Kimball 3 Trust or in his

personal capacity, surely he would have protested and complained as to the loss of his rights before this suit was filed. No such proof was produced by the plaintiff.

[89] I refer to the decision of the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where the court referred to Lord Denning's judgment where he stated:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[90] I also refer to the decision of the Court of Appeal in *Lembaga Tabung Haji & Anor v Encap Sdn Bhd* [2024] 2 MLJ 98; [2023] 1 LNS 2381 where Azimah Omar JCA held:

> [34] Estoppel would also bar the Appellants from constantly shifting the goalpost and contradicting their own prior admissions, acquiescence, and election. (see *Ho Yau Hong & Ors v How Yaw Ming and another appeal* [2023] MLJU 933; [2023] 1 LNS 827; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 of *Cheah Theam Kheang v City Centre Sdn Bhd & Other Appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16).

[91] For the above reasons, I reject the plaintiff's claim. I find that the assets in dispute belong to the first defendant and the plaintiff has no right to claim the same in the circumstances of this case.

[92] I note that all the issues concerning the debt due to the Pollard Trusts were not pleaded specifically by parties, but these facts appear in the documents filed by the litigants and are material to the facts in dispute. They were also addressed by the litigants during the trial and in their written submissions. This issue is also crucial to determine whether it was the plaintiff or the first defendant who had any rights to the sums received from the sale of the Bali property.

[93] The plaintiff also suggests that the issue of the Pollard Trust should not be addressed as the estate should be dealt with by the administrator, which allegedly should include the first defendant's sister and should be dealt with in a separate suit. I am not convinced that this is correct.

[94] It is shown to me that the administrator of the Pollard Trust is the first defendant. She has also stated that she is the sole beneficiary of her mother's estate and there is no evidence to rebut this. The actions of the plaintiff to allow her to retain the sums from the Indonesian property shows that this is most likely to be true. I also do not find any evidence of any competing claims by the first defendant's sister or any documentary evidence to support the plaintiff's contention.

[95] Therefore, this court is bound to adjudicate these issues to ensure that justice is achieved based on the facts that have been elucidated by parties during the proceedings.

[96] I further refer to the judgment of the Court of Appeal in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where Gopal Sri Ram JCA (as he then was) held:

> In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term 'estopped'. See, *Lal Somnath Singh & Ors v Ambika Prasad* AIR [1950] All 121, 131). It may be desirable for a pleader to use that term; but it is not fatal if he does not One must not lose sight of the object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308, 320; [1995] 1 CLJ 619.
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> Thus, although courts, through their pronouncements, require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle. First, there is the principle, already alluded to, that what requires to be pleaded are the relevant facts which a litigant claim to give rise to an estoppel and not any special formula in staccato: *Laws Holdings Pty Ltd v Short & Ors* [1972] 46 ALJR 563, 571.
>
> *Secondly, even where a party has failed to set out the material facts in his pleading, but there is occasioned no surprise to his opponent, a court may, in the interests of justice, permit the point to be taken: Coppinger v Norton* [1902] 2 Ir R 232, 243; *Co-operative Town Bank v Shanmugam Pillay* AIR Rang 265, 268; *Laws Holdings*. Useful reference may also be had to the instructive judgment of Edgar Joseph Jr J in *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, affirmed by the Supreme Court in [1993] 1 MLJ 393.
>
> *Thirdly, where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a Court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point*

was not pleaded: Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan [1984] 2 MLJ 1; [1984] 2 CLJ Rep 319 .

If the said trust existed whether the first defendant is guilty of the breach of trust by removing the second defendant and by withdrawing the sums of USD400,000, physical gold valued to the sum of USD166,468 and RM165,000 from the accounts held by the third defendant or by the first defendant

Whether the first defendant is guilty of revoking the two trust deeds and by failure to transfer the shares in the third defendant to the first defendant

[97] For ease of convenience, the two issues highlighted above will be dealt with together.

[98] As I have found that the said Taqua or family trusts did not come into being then this issue also falls to the wayside.

[99] I also find that the first defendant is not guilty of breach of trust in removing the second defendant as suggested by the plaintiff.

[100] I have considered the evidence of the second defendant and find her evidence to be unreliable. I do not believe that she was telling the truth concerning the allegations made against the first defendant, her mother.

[101] I find it unbelievable for her to know the finances of her parents when she was still a teenager and when she was attending school and university. I do not believe that she knew the details of her parents' finances. I do not believe that the financial details were shared with her at the material time. I also find that her evidence that she was allegedly abused by the first defendant and that she was abusive to her siblings are fabricated and untrue.

[102] I further find that the second defendant was not forced to execute the revocation of the trust. She agreed to the same and decided to comply with her mother's wishes. This does not mean that she was coerced. This is inline with the contents of her own affidavit that she affirmed on 19 February 2020.

[103] I also find that there is no evidence that the first defendant had wrongly withdrawn any sums or taken any physical gold valued to the sum of USD166,468 and RM165,000 from the accounts of the third defendant. These are mere conjectures on the part of the plaintiff unsupported by any reliable evidence.

[104] For the above reasons, I reject the plaintiff's claim against the first defendant on these two issues.

Whether the plaintiff is entitled to claim a resulting trust/remedial constructive trust for the proceeds of the monies and assets that allegedly arose from the Kimball 3 Trust

[105] I also do not find that a resulting trust has been proved based on the evidence produced in this case.

[106] As I have found earlier, the assets and monies belong solely to the first defendant due to the recognition by the plaintiff that the Indonesian property was bought utilising monies received from the Pollard Trust and the debts due to the said trust. These monies from the sale, based on the conduct of the plaintiff, and the evidence before me, were paid solely to the first defendant. This shows that the plaintiff recognises that the funds belong to her, and he has no right to the said sums.

[107] This current claim only arose once the plaintiff realised that the family relationship has fallen apart, and he has no right to claim any monies or assets owned by the first defendant. I find that this claim is a mere afterthought on the part of the plaintiff. If his allegations are true, he would have surely recorded these claims in a written instrument and demanded these sums to be paid into a joint account. Instead, the monies were kept solely in the hands of the first defendant. Not a single complaint was recorded by the plaintiff and instead confirmation of the existence of the said right and the debt owed by the plaintiff to the first defendant was recorded in writing. To me, the document dated 8 March 2016 confirms that the monies belonged to the first defendant.

[108] I therefore find that the plaintiff's reliance on resulting trust as explained in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 and *David Wee Eng Siew (administrator to the estate of Lim Eang Tee, deceased) v Lim Lean Seng & Anor (as executors and trustees of the estate of Lim Eow Thoon, deceased)* [2018] Supp MLJ 50 is of no assistance to the plaintiff.

[109] On the issue of constructive trust, I also find that the equity of this case does not support the plaintiff. His reliance on *Theow Say Kow @ Teoh Kiang Seng, Henry v Graceful Frontier Sdn Bhd & Ors and other appeals* [2020] MLJU 57; [2020] 1 LNS 52 and *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175; [2015] 1 CLJ 309 does not lend any assistance to his cause. I do not find any unconscionable conduct on the part of defendants as suggested by the plaintiff. As I have said earlier, at this stage, the assets and monies belong to the first defendant. It is up to the first defendant to deal with the said assets as she deems fit.

[110] I also reject the plaintiff's claim for the reasons mentioned above. For the reasons stated above, I find that the plaintiff has failed to prove his case against the defendants.

Claim of conspiracy against the defendants

[111] Regarding the alleged conspiracy between the First and Fourth defendants, I do not find any wrongdoing as alleged by the plaintiff. The evidence before me shows that parties had acted honestly in accordance with the terms of the Trust instruments.

[112] Furthermore, any dispute that parties have against the fourth defendant was resolved amicably and does not form part and parcel of the claim before me.

Whether the first defendant was abusive and is guilty of domestic violence against the plaintiff

Whether the first defendant denied the plaintiff access to his children and his private properties

[113] On the issues concerning the alleged violence, abuse, and denial of the plaintiff's rights as a parent and to his property against the first defendant, I find that there is no evidence to support the plaintiff's contention.

ORDERS OF THIS COURT

[114] For the above reasons I make the following orders:

(a) the plaintiff's claim against the defendants is dismissed;

(b) the plaintiff is directed to pay costs of RM50,000 to each set of defendants subject to allocater; and

(c) security for costs of RM100,00 to be utilised to pay the cost directed above to each set of defendants solicitors and the remainder to be returned.

Claim dismissed.

Reported by Nabilah Syahida Abdullah Salleh